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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

5 MICHAEL A. BUTTOLPH,

6 Plaintiff,

7 vs.

8 CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

9 Defendant.

No. 2:12-509-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

10 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 15, 16.)
11 Attorney Dana C. Madsen represents plaintiff; Special Assistant United States Attorney L.
12 Jamala Edwards represents defendant. After reviewing the administrative record and briefs filed
13 by the parties, the court GRANTS defendant's Motion for Summary Judgment and DENIES
14 plaintiff's Motion for Summary Judgment.

15 **JURISDICTION**

16 Plaintiff Michael A. Buttolph (plaintiff) protectively filed for supplemental security
17 income (SSI) and disability insurance benefits (DIB) on July 13, 2010. (Tr. 121, 145.) Plaintiff
18 alleged an onset date of May 1, 2001. (Tr. 121, 144.) Benefits were denied initially and on
19 reconsideration. (Tr. 63, 67, 75, 80.) Plaintiff requested a hearing before an administrative law
20 judge (ALJ), which was held before ALJ Marie Palachuk on August 23, 2011. (Tr. 41-58.)
21 Plaintiff was represented by council and testified at the hearing. (Tr. 46-54.) Medical expert
22 Margaret Moore, Ph.D. and vocational expert Sharon Welter also testified. (Tr. 43-45, 55-58.)
23 The ALJ denied benefits (Tr. 20-28) and the Appeals Council denied review. (Tr. 1.) The matter
is before this court pursuant to 42 U.S.C. § 405(g).

24 **STATEMENT OF FACTS**

25 The facts of the case are set forth in the administrative hearing transcripts, the ALJ's
26 decision, and the briefs of plaintiff and the Commissioner, and will therefore only be
27 summarized here.

1 Plaintiff was 33 years old at the time of the hearing. (Tr. 46.) He went to school through
 2 the eleventh grade. (Tr. 46.) He has work experience as a cook, dishwasher, roofer, and metal
 3 grinder. (Tr. 47-48.) He testified he stopped working due to a mental breakdown. (Tr. 49.) He
 4 has felt very depressed. (Tr. 50.) He does not sleep well. (Tr. 51.) He testified he cannot work
 5 because he is so depressed he cannot think to focus on a job. (Tr. 53.)

6 STANDARD OF REVIEW

7 Congress has provided a limited scope of judicial review of a Commissioner's decision.
 8 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ,
 9 when the determination is not based on legal error and is supported by substantial evidence. *See*
 10 *Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th
 11 Cir. 1999). "The [Commissioner's] determination that a claimant is not disabled will be upheld if
 12 the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570,
 13 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere
 14 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a
 15 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v.*
 16 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial
 17 evidence "means such relevant evidence as a reasonable mind might accept as adequate to
 18 support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted).
 19 "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the
 20 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
 21 review, the Court considers the record as a whole, not just the evidence supporting the decision
 22 of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
 23 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

24 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.
 25 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the
 26 Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
 27 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by
 substantial evidence will still be set aside if the proper legal standards were not applied in
 weighing the evidence and making the decision. *Browner v. Sec'y of Health and Human Serv.*,
 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support the

1 administrative findings, or if there is conflicting evidence that will support a finding of either
 2 disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812
 3 F.2d 1226, 1229-30 (9th Cir. 1987).

4 SEQUENTIAL PROCESS

5 The Social Security Act (the “Act”) defines “disability” as the “inability to engage in any
 6 substantial gainful activity by reason of any medically determinable physical or mental
 7 impairment which can be expected to result in death or which has lasted or can be expected to
 8 last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c
 9 (a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only
 10 if his impairments are of such severity that plaintiff is not only unable to do his previous work
 11 but cannot, considering plaintiff’s age, education and work experiences, engage in any other
 12 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
 13 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational
 14 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

15 The Commissioner has established a five-step sequential evaluation process for
 16 determining whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one
 17 determines if he or she is engaged in substantial gainful activities. If the claimant is engaged in
 18 substantial gainful activities, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I),
 19 416.920(a)(4)(I).

20 If the claimant is not engaged in substantial gainful activities, the decision maker
 21 proceeds to step two and determines whether the claimant has a medically severe impairment or
 22 combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant
 23 does not have a severe impairment or combination of impairments, the disability claim is denied.

24 If the impairment is severe, the evaluation proceeds to the third step, which compares the
 25 claimant’s impairment with a number of listed impairments acknowledged by the Commissioner
 26 to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
 27 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the
 listed impairments, the claimant is conclusively presumed to be disabled.

If the impairment is not one conclusively presumed to be disabling, the evaluation
 proceeds to the fourth step, which determines whether the impairment prevents the claimant from
 performing work he or she has performed in the past. If plaintiff is able to perform his or her

1 previous work, the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
 2 At this step, the claimant's residual functional capacity ("RFC") assessment is considered.

3 If the claimant cannot perform this work, the fifth and final step in the process determines
 4 whether the claimant is able to perform other work in the national economy in view of his or her
 5 residual functional capacity and age, education and past work experience. 20 C.F.R. §§
 6 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

7 The initial burden of proof rests upon the claimant to establish a prima facie case of
 8 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel*
 9 *v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant
 10 establishes that a physical or mental impairment prevents him from engaging in his or her
 11 previous occupation. The burden then shifts, at step five, to the Commissioner to show that (1)
 12 the claimant can perform other substantial gainful activity and (2) a "significant number of jobs
 13 exist in the national economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
 14 1498 (9th Cir. 1984).

15 **ALJ'S FINDINGS**

16 At step one of the sequential evaluation process, the ALJ found plaintiff engaged in
 17 substantial gainful from May 1, 2001, the alleged onset date, through March 1, 2010. (Tr. 22.)
 18 However, the ALJ also found there has been a continuous 12-month period during which
 19 plaintiff did not engage in substantial gainful activity. (Tr. 23.) At step two, the ALJ found
 20 plaintiff has the following severe impairment: dysthymia. (Tr. 23.) At step three, the ALJ found
 21 plaintiff does not have an impairment or combination of impairments that meets or medically
 22 equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 23.) The ALJ
 23 then determined:

24 [C]laimant has the residual functional capacity to perform a full range of work at
 25 all exertional levels. From a mental standpoint, the claimant is able to understand,
 26 remember, and carry[]out simple routine, repetitive instructions/tasks due to his
 27 limited education. The claimant is also limited to only occasional interaction with
 the public or coworkers due to the claimant not always maintaining appropriate
 behavior.

(Tr. 24). At step four, the ALJ found plaintiff is capable of performing past relevant work. (Tr.
 28.) Thus, the ALJ concluded plaintiff has not been under a disability as defined in the Social
 Security Act from May 1, 2001 through the date of the decision. (Tr. 28.)

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Specifically, plaintiff asserts the ALJ did not properly consider the psychological opinion evidence. (ECF No. 15 at 6-9.) Defendant argues the ALJ: (1) properly evaluated and gave proper weight to the medical evidence; and (2) made proper RFC and step four findings. (ECF No. 16 at 4-12.)

DISCUSSION

Plaintiff argues the ALJ did not properly consider or reject the opinion of Dr. Brown, an examining psychologist. (ECF No. 15 at 6.) Dr. Brown examined plaintiff and completed a DSHS Psychological/Psychiatric Evaluation form on August 1, 2010. (Tr. 186-93.) Dr. Brown diagnosed dysthymia and posttraumatic stress disorder and assessed moderate limitations regarding the ability to relate appropriately to co-workers and supervisors and the ability to maintain appropriate behavior in a work setting. (Tr. 190.) The ALJ gave little weight to Dr. Brown's opinion. (Tr. 27.)

In disability proceedings, a treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995). Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical support for doctors' reports based substantially on a claimant's subjective complaints of pain as specific, legitimate reasons for disregarding a treating or examining physician's opinion. *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*, 885 F.2d at 604.

If a treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). However, if contradicted, the ALJ may reject the opinion if he states specific, legitimate reasons

1 that are supported by substantial evidence. *See Flaten v. Secretary of Health and Human Serv.*,
 2 44 F.3d 1453, 1463 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir.
 3 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989).

4 The ALJ gave several reasons for rejecting Dr. Brown's opinion. (Tr. 27.) First, the ALJ
 5 rejected Dr. Brown's opinion because it is largely based on plaintiff's self-report. (Tr. 27.) A
 6 physician's opinion may be rejected if it is based on a claimant's subjective complaints which
 7 were properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v.*
 8 *Comm'r*, 169 F.3d 595 (9th Cir. 1999); *Fair*, 885 F.2d at 604. The ALJ made a negative
 9 credibility finding based on clear and convincing reasons supported by substantial evidence
 10 which is not challenged by plaintiff.¹ Thus, the ALJ reasonably rejected Dr. Brown's report to
 11 the extent it is based on plaintiff's own statements. Plaintiff argues Dr. Brown's opinion is not
 12 based solely on plaintiff's self-report and cites the results of the Mini-Mental Status Exam, Trails
 13 A&B, and the PAI appended to Dr. Brown's opinion. (ECF No. 15 at 7, Tr. 193.) However,
 14 plaintiff made no errors on the Mini-Mental Status Exam and the results were in the normal
 15 range. The medical expert, Dr. Moore, also pointed out the mental status exam reflects no
 16 limitations. (Tr. 26, 45.) Similarly, the Trails A&B results were in the normal range. (Tr. 193.)
 17 Plaintiff notes the Rey test of malingering showed plaintiff was not feigning memory loss (ECF
 18 No. 15 at 7, Tr. 193), yet limitations due to memory loss are not mentioned in Dr. Brown's
 19 findings. Dr. Brown's narrative regarding the PAI results state the results are "valid and
 20 consistent with his history and clinical interview" and indicates the scores are reflected in the
 21 social ratings of the DSHS form. (Tr. 193.) However, Dr. Brown did not cite the PAI as
 22 supporting the limitations assessed on the DSHS form or otherwise explain or interpret the

21 ¹ If the ALJ finds that the claimant's testimony as to the severity of pain and impairments is
 22 unreliable, the ALJ must make a credibility determination with findings sufficiently specific to
 23 permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony.
 24 *Morgan v. Apfel*, 169 F.3d 595, 601-02 (9th Cir. 1999). In the absence of affirmative evidence of
 25 malingering, the ALJ's reasons must be "clear and convincing." *Lingenfelter v. Astrue*, 504 F.3d
 26 1028, 1038-39 (9th Cir. 2007); *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *Morgan*,
 27 169 F.3d at 599. The ALJ pointed out plaintiff's reported activities and the objective medical
 evidence are inconsistent with plaintiff's allegations and cited specific examples of evidence
 supporting these reasons. (Tr. 25-26.) The reasons cited by the ALJ clear and convincing reasons
 justifying the negative credibility finding which are supported by substantial evidence. *See*
Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d 597, 603 (9th
 Cir. 1989); 20 C.F.R. § 416.929(c)(2).

1 results. (Tr. 190.) This reasonably suggests Dr. Brown largely relied on plaintiff's own
2 statements in diagnosing and assessing plaintiff's complaints and the ALJ did not err.

3 Second, the ALJ pointed out Dr. Brown's report is based on one exam conducted for the
4 purpose of determining eligibility for welfare assistance. (Tr. 27.) The ALJ observed plaintiff
5 had motivation to overstate his symptoms and complaints and that Dr. Brown is not a treating
6 provider. (Tr. 27.) The purpose for which medical reports are obtained does not provide a
7 legitimate basis for rejecting them. *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1996). Further, by
8 definition, an examining physician or psychologist sees a patient one time, yet ALJs are directed
9 to consider the opinions of examining sources. 20 C.F.R. § 404.1527. As a result, it is not
10 appropriate to disregard a source because the findings are based on one exam. The ALJ's second
11 reason for rejecting Dr. Brown's report is not a legitimate reason for rejecting the opinion;
12 therefore the ALJ erred. However, because the ALJ cited other specific, legitimate reasons
supported by substantial evidence which justify rejecting Dr. Brown's report, the error is
harmless. *See e.g., Morgan*, 169 F.3d at 601-02.

13 The third reason mentioned by the ALJ in rejecting Dr. Brown's opinion is the report is
14 made on a check-box form with few objective findings supporting the degree of limitation
15 assessed. (Tr. 27.) An ALJ may discredit treating physicians' opinions that are conclusory, brief,
16 and unsupported by the record as a whole or by objective medical findings. *Batson v. Comm'r,*
17 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). Further, opinions on a check-box form or
18 form reports which do not contain significant explanation of the basis for the conclusions may
19 accorded little or no weight. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); *Johnson v.*
20 *Chater*, 87 F.3d 1015, 1018 (9th Cir. 1996). The ALJ pointed out the opinion contains few
21 objective findings supporting the degree of limitation alleged. (Tr. 27.) As noted *supra*, the
22 mental status exam and other test results were essentially normal and do not support significant
23 limitations. (Tr. 26, 193.) Further, the ALJ cited Dr. Moore's testimony that there is "very little
24 basis" in Dr. Brown's opinion supporting the diagnosis of PTSD. (Tr. 27, 45.) The ALJ
25 reasonably concluded Dr. Brown's opinion on a check-box form is not well-supported by the
26 record or objective findings.² This is a specific, legitimate reason for rejecting Dr. Brown's
27 opinion.

² It is also noted that Dr. Brown actually opined plaintiff could work. (Tr. 190.) Although the ALJ gave weight to the opinions of Drs. Moore, Flanagan and Beaty, the ALJ assessed a

1 The ALJ provided specific, legitimate reasons supported by substantial evidence which
2 justify rejecting Dr. Brown's opinion. Thus, the ALJ did not err.

3 Plaintiff also argues the ALJ erred in relying on the opinions of non-treating, non-
4 examining psychologists, including the psychological expert, Dr. Moore, and the opinions of
5 reviewing psychologists Dr. Flanagan and Dr. Beaty. (ECF No. 17 at 6-7.) Dr. Flanagan
6 reviewed the record and concluded plaintiff is able to understand, remember and carry out
7 multistep tasks but that concentration, persistence and pace would occasionally be impaired
8 secondary to plaintiff's symptoms. (Tr. 197.) Dr. Flanagan also found plaintiff has no significant
9 social functioning limitation nor any significant adaptive limitations. (Tr. 197.) Dr. Beaty
10 reviewed the evidence and affirmed Dr. Flanagan's findings. (Tr. 213.) Dr. Moore reviewed the
11 record and observed Dr. Brown's opinion is the only record based on a face-to-face exam. (Tr.
12 44.) Dr. Moore opined there is very little basis for Dr. Brown's finding of PTSD although the
13 diagnosis of dysthymia may be understandable in light of situational factors. (Tr. 44-45.)
14 However, Dr. Moore opined that based on the mental status exam results and the very little
15 record available, there are no severe limitations. (Tr. 45.)

16 As noted by plaintiff, specific, legitimate reasons are required to reject the opinion of an
17 examining provider in favor of the opinion of a non-examining advisor. (ECF No. 15 at 8, *citing*
18 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996)). When the opinion of a non-examining
19 psychologist is consistent with other evidence, it may be entitled to greater weight than the
20 opinion of an examining psychologist. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). In
21 this case, there was no evidence before the ALJ³ by any treating or examining provider other

22 limitation of occasional interaction with the public or coworkers due to the claimant not always
23 maintaining appropriate behavior. (Tr. 24, 56-57.) These limitations are similar to the limitations
24 assessed by Dr. Brown on the DSHS form. (Tr. 190.) The vocational expert testified a person
25 with those limitations could work, which is also consistent with Dr. Brown's conclusion that
26 plaintiff could work. (Tr. 56-57, 190.) However, when asked by plaintiff's counsel to define the
27 moderate limitations using the definition of "moderate" found on the form, "significant
interference with basic work-related activities," the vocational expert testified a person with
those limitations cannot work. (Tr. 57, 189.) This is inconsistent with Dr. Brown's opinion that
plaintiff could work and demonstrates how check-box forms may limit the nuances of an
opinion.

³ The record before the ALJ included the opinions of Dr. Brown, Dr. Flanagan and Dr. Beaty.
There were no treatment records, exam notes or any other medical or psychological evidence in
the record at the time of the ALJ's decision. Six medical records from Native Health Spokane
were submitted to the Appeals Council and are part of the record before the court. *See Harman v.*

1 than Dr. Brown. However, the ALJ cited specific, legitimate reasons supported by the record
2 which reasonably undermine Dr. Brown's conclusions. Furthermore, the ALJ pointed out
3 evidence consistent with the findings of Dr. Moore which also support the ALJ's conclusions.
4 (Tr. 26-27.) The ALJ also gave plaintiff the benefit of the doubt and assessed some mental health
5 limitations consistent with Dr. Brown's conclusion that plaintiff could work. (Tr. 24.) As a
6 result, the ALJ properly weighed and considered the psychological opinion evidence.

7 CONCLUSION

8 Having reviewed the record and the ALJ's findings, this court concludes the ALJ's
9 decision is supported by substantial evidence and is not based on error.

10 IT IS ORDERED:

- 11 1. Defendant's Motion for Summary Judgment (**ECF No. 16**) is **GRANTED**.
- 12 2. Plaintiff's Motion for Summary Judgment (**ECF No. 15**) is **DENIED**.

13 The District Court Executive is directed to file this Order and provide a copy to counsel
14 for plaintiff and defendant. Judgment shall be entered for defendant and the file shall be
15 **CLOSED**.

16 DATED February 5, 2013

17 s/Fred Van Sickle
18 FRED VAN SICKLE
19 SENIOR UNITED STATES DISTRICT JUDGE
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26 *Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir.
27 1993); (Tr. 5, 217-33.) None of the records submitted to the Appeals Council affect the ALJ's
findings as they do not relate to the period covered by the ALJ's decision.